

# Journal of Civil Rights and Economic Development

---

Volume 7  
Issue 2 *Volume 7, Spring 1993, Issue 2*

Article 10

---

March 1992

## The Resurgence of Censorship in the Twentieth Century?: The Ninth Circuit's Response in Planned Parenthood v. Clark County School District

Lana E. Levine

Catherine A. Reardon

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

---

### Recommended Citation

Levine, Lana E. and Reardon, Catherine A. (1992) "The Resurgence of Censorship in the Twentieth Century?: The Ninth Circuit's Response in Planned Parenthood v. Clark County School District," *Journal of Civil Rights and Economic Development*. Vol. 7 : Iss. 2 , Article 10.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol7/iss2/10>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# A RESURGENCE OF CENSORSHIP IN THE TWENTIETH CENTURY?: THE NINTH CIRCUIT'S RESPONSE IN *PLANNED PARENTHOOD v. CLARK COUNTY SCHOOL DISTRICT*

Censorship is a universal phenomenon which can be traced back centuries before the birth of our nation.<sup>1</sup> Academic institutions have frequently utilized it to regulate the content of high school newspapers, prohibit free speech in the classroom, remove books from library shelves, and determine the content of school curricula.<sup>2</sup> Recently, the United States Court of Appeals for the Ninth Circuit reevaluated academic censorship in *Planned Parenthood of Southern Nevada v. Clark County School District*,<sup>3</sup> and held that the First Amendment rights of high school students were not violated when their administration refused to publish an advertisement from Planned Parenthood in their school newspaper.<sup>4</sup> This deci-

<sup>1</sup> See Walter Gellhorn, *Restraints on Book Reading*, in *THE FIRST FREEDOM* 20, 20 (Robert B. Downs ed., 1960). Strictly speaking, censorship means "prohibiting expression or communication." *Id.* "When legally enforceable, this connotes official action to prevent the writing or if too late, to prevent the publication or other circulation of what the censors deem objectionable." *Id.* "Unofficial censorship derives its force not from legal mechanisms, but, at its best, from persuasion and at its worst, from implacable economic or political pressure abetted by misuse of police authority." *Id.* at 21; see also Arthur Schlesinger, Jr., *Preface to CENSORSHIP: FIVE HUNDRED YEARS OF CONFLICT* 7, 7 (William Zeisel ed., 1984) [hereinafter *CENSORSHIP*]. The Old Testament recounts, "[t]ell it not in Gath, . . . publish it not in the streets of Askelon; lest the daughters of the Philistines rejoice, lest the daughters of the circumcised triumph." *Id.* The Greek philosopher Plato once wrote:

[A] poet shall compose nothing contrary to the ideas of the lawful, or just, or beautiful, or good, which are allowed in the state; nor shall he be permitted to show his composition . . . until he shall have shown them to the appointed censors and the guardians of the law, and they are satisfied with them.

*Id.*

<sup>2</sup> See *Board of Educ. of Island Trees v. Pico*, 457 U.S. 853, 859 (1982) (school board removed nine books from library shelves because they were deemed morally offensive); *Bishop v. Aronov*, 926 F.2d 1066, 1075-76 (11th Cir. 1991) (university professor prohibited from interjecting religious beliefs during class); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 796 (5th Cir. 1989) (school district restricted contents of supplemental reading list for history class), *cert. denied*, 110 S. Ct. 2620 (1990); *Nicholson v. Board of Educ. Torrance U.S.D.*, 682 F.2d 858, 863 (9th Cir. 1982) (articles submitted to school newspaper required to undergo prepublication review by principal).

<sup>3</sup> 941 F.2d 817 (9th Cir. 1991).

<sup>4</sup> *Id.* at 830. The Ninth Circuit held that the student publication was not a public forum; that schools did not create a limited purpose public forum for advertisers of goods and

sion illustrates a shift in the interpretation of traditional First Amendment principles, whose impact on our nation's youth is unknown.<sup>5</sup>

This Note will examine the historical evolution of censorship, its impact on the "marketplace of ideas," and the modern day problem it poses in the educational system. Part One will discuss the development of censorship. Part Two will analyze specific problems raised by censorship in modern times. Focusing on *Planned Parenthood*, Part Three will discuss the difficulty in interpreting and applying precedent pertaining to the censorship of student publications. Parts Four and Five will consider other areas in the educational realm where questions concerning the validity of censorship remain unanswered, and will propose that educators firmly adhere to First Amendment principles when formulating school policies and practices.

## I. THE EVOLUTION OF CENSORSHIP

### A. *The Written Word—The Birth of Censorship*

As far back as the ancient Mesopotamians, man's desire to record and remember important events was evidenced by his primitive yet innovative method of carving on clay tablets.<sup>6</sup> Steadily, methods of recordation and circulation of information evolved,

services; and that the justification for rejection of Planned Parenthood's advertisement was reasonable. *Id.*

<sup>5</sup> See Helene Bryks, Comment, *A Lesson in School Censorship: Hazelwood v. Kuhlmeier*, 55 BROOK. L. REV. 291, 304 (1989). "The result of the Court's revision of precedent and failure to recognize first amendment values is a decision that potentially vitiates all student free speech rights." *Id.* See generally Charles R. Lawrence III, *Education for Self-Government: Reassessing the Role of the Public School in a Democracy*, 82 MICH. L. REV. 810, 811-12 (1984) (reviewing STEPHEN ARONS, *COMPPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING* (1983)). Mr. Arons rejects the notion that the school functions as a guardian. *Id.* at 810. On the contrary, he believes that the political structure of American schooling is unconstitutional. *Id.* Arons further purports that because of "involuntary governmental manipulation" of the "consciousness" of the governed, school children are becoming "politically impotent." *Id.*

<sup>6</sup> See SAMUEL N. KRAMER, *CRADLE OF CIVILIZATION* 122 (1967). Over a thousand small clay tablets have been found in ancient Mesopotamia "inscribed with pictographic forerunners of cuneiform script, dating from about 3100 B.C." *Id.* As pictographic writing developed, man's first known legal documents began to appear in the form of property sales contracts and other transactions and agreements between private individuals. *Id.*; see also SETON LLOYD, *THE ARCHAEOLOGY OF MESOPOTAMIA* 37 (1978). The earliest use of writing can be credited to the Sumerians of ancient Mesopotamia. *Id.*

## Resurgence of Censorship

and became instrumental in man's discovery of himself and the world around him.<sup>7</sup>

In 1521, less than 100 years after the printing press had been invented, Charles V of Belgium issued *The Edict of Worms* in an attempt to censor controversial works.<sup>8</sup> This was done in response to Martin Luther's Protestant teachings which were antithetical to established Catholic teachings.<sup>9</sup> The *Edict* contained a "Law of Printing" that prohibited the "printing, sale, possession, reading, or copying of Luther's works."<sup>10</sup> Similarly, in 1564, Pope Paul IV promulgated the *Index librorum prohibitorum*, which listed books and authors that could not be printed or read by Catholics.<sup>11</sup> In England, Protestant censorship existed under the authority of the English Crown which used its police power to impose regulations, enforce censorship and punish heretics.<sup>12</sup> Religious censorship

<sup>7</sup> See EDWARD CHIERA. *THEY WROTE ON CLAY* 22 (George G. Cameron ed., 1938). "These little clay tablets, with all sorts of records, began to pile up in great numbers early in the third millennium B.C. . . . [and thus] we have an unbroken line of documents covering all phases of knowledge throughout those centuries." *Id.*; see also KRAMER, *supra* note 6, at 122. "By the 15th Century B.C., the flow of cuneiform documents came not only from Mesopotamia, but also from Syria, Palestine and even as far away as Egypt." *Id.* at 123.

<sup>8</sup> See Paul F. Grendler, *The Advent of Printing, in CENSORSHIP*, *supra* note 1, at 24, 29 (Charles V issued Edict of Worms in attempt to censor Martin Luther's works); see also Robert B. Downs, *We Have Been Here Before: A Historical Retrospect, in THE FIRST FREEDOM*, *supra* note 1, at 1, 2. One of the earliest lists of censored books was promulgated by Emperor Charles V in Belgium in 1524, and was drawn up under clerical direction. *Id.* "The theological faculty of the University of Louvain made itself dreaded throughout Europe by the fierce and reiterated attacks which it made on the freedom of the Press." *Id.*

<sup>9</sup> See LUTHER HESS WARING. PH.D. *THE POLITICAL THEORIES OF MARTIN LUTHER* 237 (1910). Martin Luther's writings advanced his belief that every individual has the right to think and believe, in all matters religious and political, as he sees fit. *Id.* But see Grendler, *supra* note 8, at 29 (stating that "Luther himself endorsed censorship and acknowledged the power of the written word when he urged his immediate temporal lord . . . to prohibit the writings of . . . a follower").

<sup>10</sup> Grendler, *supra* note 8, at 29.

<sup>11</sup> See Downs, *supra* note 8, at 2. During the Inquisition in Venice, Milan, and Spain, Pope Paul IV drew up the *Index librorum prohibitorum*. *Id.* This *Index* was the "most formidable engine of literary tyranny" and was "circulated throughout the Catholic world." *Id.*; Grendler, *supra* note 8, at 30. The *Index librorum prohibitorum* (Index of Prohibited Books), also called the *Tridentine Index* because it was authorized by the Council of Trent, was promulgated by the papacy in 1564, and was revised approximately once every fifty years. *Id.* The *Index* "also banned some anti-clerical, lascivious, pornographic, and political works, such as those of Machiavelli, as well as books of magic, demonology, and other occult arts." *Id.*

<sup>12</sup> See Grendler, *supra* note 8, at 31. The state took an active role in censorship because most Protestant religious leaders granted the state substantial authority over the Church. *Id.*; see also ERNEST E. BEST. *RELIGION AND SOCIETY IN TRANSITION: THE CHURCH AND SOCIAL CHANGE IN ENGLAND, 1560-1850*, at 3 (1982). Queen Elizabeth I was recognized by the

aided the ascendancy of the Church of England by creating an unstable and vulnerable state of affairs.<sup>13</sup> The gulf between Protestants and Catholics was enlarged by censorship, creating a rift which eventually led to the Glorious Revolution of 1688, which resulted in the throne's recognition of Parliament's right to govern.<sup>14</sup> The aftermath of this internal conflict, however, found England enjoying unprecedented freedoms of speech and press, as well as a more democratic society.<sup>15</sup>

### *B. Censorship In Colonial America*

The colonization of the New World enticed many dissatisfied Englishmen to move to America in search of new freedoms and a

church and state as "Supreme Governor." *Id.*; CLAIRE CROSS, CHURCH AND PEOPLE: 1450-1660, at 143 (1976). After the papal excommunication of Elizabeth I in 1570, "Parliament passed an act making it treason to question the Queen's title to the throne or to call her a heretic, schismatic or usurper." *Id.* Further proof of the Crown's use of police power arose between 1570 and 1603 when the government permitted approximately 200 Catholic priests and laymen to be put to death for their faith. *Id.*; Richard Hanser, *Shakespeare, Sex . . . and Dr. Bowdler*, in THE FIRST FREEDOM, *supra* note 1, at 15, 17. However, evidencing a resistance to the crown's censorship policies were the plays and poems of William Shakespeare, which, with their subtle themes of sexuality and bawdiness, exemplified a repugnance for authority and existing mores of the day. *Id.* In 1818, English editor Thomas Bowdler censored Shakespeare's works in his book *Family Shakespeare*; thus the term "Bowdlerism" developed as a synonym for "prudish and senseless expurgation." *Id.* at 14.

<sup>13</sup> See DAVID B. QUINN, ENGLAND AND THE DISCOVERY OF AMERICA, 1481-1620, at 337-39 (1973). In England, the issue of political loyalty complicated the religious picture when the church of Queen Elizabeth I broke with Catholics, Protestants, and Separatists. *Id.* at 337-38. Catholics who remained loyal to the crown were fined for not attending church; Protestants held service in secret; many other religious dissidents fled the jurisdiction of the crown. *Id.*; see also BEST, *supra* note 12, at 13. "[B]ecause the interests of all parties were not only strictly religious but always involved with relative economic and political power, no one faction at this time could totally defeat the other." *Id.*; Grendler, *supra* note 8, at 32. "A Lutheran state might not permit the publication of Calvinist books within its borders and vice-versa; both Lutheran and Calvinist states normally prohibited the books of Anabaptists . . . ." *Id.*

<sup>14</sup> See BEST, *supra* note 12, at 3. The struggle between religious factions in England went on for a century and a half and was not settled until the Glorious Revolution of 1688. *Id.*; J.A.G. GRIFFITH, PARLIAMENT FUNCTIONS, PRACTICE AND PROCEDURES 3 (1989) (Glorious Revolution and other dramatic events of seventeenth century led to practice of Ministers of the Crown's holding positions in one of the Houses of Parliament).

<sup>15</sup> See Margaret C. Jacob, *A New Consensus 1600-1700*, in CENSORSHIP, *supra* note 1, at 52, 55. After the English Revolution of 1640-60, Englishmen enjoyed "a freedom of press unprecedented anywhere else in Europe." *Id.* In the Revolution of 1688-89, "the dethronement of James II (1685-1688) removed the specter of absolute monarchy from England itself, abolished the church courts with their power to police mores and beliefs, and insured *habeas corpus* and trial by jury for propertied classes." *Id.*

## Resurgence of Censorship

new beginning.<sup>16</sup> Nevertheless, the specter of censorship and its repression of ideas followed the colonists and soon manifested itself in colonial societies.<sup>17</sup> It was not until the drafting and adoption of the Constitution, which laid the foundation for a truly free society, that official censorship was effectively ended.<sup>18</sup> Within a few years, however, Congress passed the Alien and Sedition Acts of 1798 which introduced new restrictions on freedom of speech

<sup>16</sup> See QUINN, *supra* note 13, at 364. For many Englishmen, "the American field offered an opportunity to live a life unhampered by the restrictions of European government, particularly in the matter of religion." *Id.* But *cf. id.* at 348. Not all Englishmen came to America of their own volition. *Id.* Many religious dissidents were strongly persuaded by Queen Elizabeth I to either "conform in religion" or "stay away from England," thereby forcing many into exile. *Id.*

<sup>17</sup> See JOHN L. STAGE, *THE BIRTH OF AMERICA* 162 (1975). The majority of colonial governors in the eighteenth century were "the king's men." *Id.* Only a minority were elected by settlers or named by their proprietors. *Id.* They represented the authority of both the Crown and Parliament. *Id.* A governor was "charged with preserving and asserting the power of the home land over its American possessions." *Id.* In many colonial settlements "church membership was a prerequisite to voting, [and] generally office holding was confined to Protestants. *Id.*; see also *The Trial of John Peter Zenger*, 17 Howell St. Trials 675 (1735); LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 37-44 (1985). "The Zenger case in 1735 gave the press freedom to print as far as the truth carried . . . [and is regarded] as a watershed [case] in the evolution of freedom of the press." *Id.* at 37. Printer-publisher John Peter Zenger was charged with seditious libel for attacking the Royal Governor, William Cosby, and his administration in *The New York Weekly Journal* which Zenger published. *Id.* at 38-44. Letters to the editor claimed that the Governor arbitrarily used his political power, was incompetent, suppressed trial by jury and did not give adequate attention to the defense of the colonies. *Id.* See generally LEONARD W. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION* 28-87 (Harper & Row, 1963) (describing American Colonial experience with censorship).

<sup>18</sup> See generally JON KULKA, *THE BILL OF RIGHTS: A LIVELY HERITAGE* 37 (1987). After being elected to the House of Representatives in 1789, James Madison introduced a set of rights to be added to the Constitution, among which was the clause "that freedom of the press shall be inviolable." *Id.* This became the forerunner of the First Amendment. *Id.*; Joel H. Weiner, *Social Purity and Freedom of Expression*, in *CENSORSHIP*, *supra* note 1, at 91, 102. Appropriately applied to this period in American history are the words of John Milton in *Areopagitica*: "That which purifies us is trial, and trial is by what is contrary." *Id.* But *cf. id.* at 101.

[The Comstock Act of 1873] laid the basis for the prosecutions of leading birth-control advocates such as Edward Bliss Foote and Margaret Sanger; the exclusion of works by Rabelais, Boccaccio, Voltaire, and other 'obscene' writers; the destruction of many obscure books and illustrations and the prosecution of news agents and bookdealers who sold them; and successful legal actions against several significant literary works including Elinor Glyn's *Three Weeks* (1908) and Theodore Dreiser's *The Genius* (1916).

*Id.*: 16 AM. JUR. 2D, *Constitutional Law* § 17, at 329 (1979) (Constitution established fundamental democratic principles). The United States Constitution went into effect on March 3, 1789. *Id.* The drafters of the Constitution intended it to be a "primer of fundamental principles for the conduct of a developing federal system rather than a manual of technical rules." *Id.* § 6, at 320.

and print.<sup>19</sup>

### *C. Governmental Intrusion in the Twentieth Century*

In the wake of World War I, governmental fear of anarchist plots, coupled with technological breakthroughs in communication, resulted in an increase in censorship.<sup>20</sup> To counteract this increase, many intellectuals of the 1920s revived the war against censorship, particularly in the academic setting.<sup>21</sup> An example of this anti-censorship movement was the *Scopes* trial in 1925, which centered on the issue of whether public school students could be taught the Darwinian theory of evolution.<sup>22</sup> The *Scopes* trial led to much debate and an examination of the state and local textbook

<sup>19</sup> See NAT HENTOFF, *THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA* 80 (1980). The rationale for the Acts of 1798 evolved during the war between England and France in 1793 as the war was being reported by American papers. *Id.* The Federalists empathized with the British while the Republicans sided with the French. *Id.* The aggressive Republican press continually insulted the Federalists until Alexander Hamilton warned them that those men so fiercely opposed to the anti-French policy of President John Adams would ultimately be regarded by the people as similar to the Tories in the American Revolution. *Id.*

<sup>20</sup> See CHARLES H. BUSH, *AN INTELLECTUAL FREEDOM PRIMER* 15 (1977). New modes of communication proved to be most advantageous to the United States in the early twentieth century. *Id.* In 1915, "the most illustrious prototype of our present-day film, *Birth of a Nation*, was produced"; in 1920 the "first scheduled radio news broadcast" was made; and in 1928 the "first public demonstration of television" premiered in New York. *Id.*; see also *Abrams v. United States*, 250 U.S. 616 (1919). In upholding a defendant's conviction of conspiring to violate the Espionage Act, the Supreme Court held that the First Amendment did not protect printing and disseminating anti-American literature during wartime. *Id.* at 619; *Schenck v. United States*, 249 U.S. 47, 51-52 (1919) (upheld conviction of General Secretary of Socialist Party under Espionage Act). Writing for the majority Justice Holmes stated: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Id.* at 52; *Debs v. United States*, 249 U.S. 211, 216 (1919) (defendant's conviction of violating Espionage Act upheld).

<sup>21</sup> See BUSH, *supra* note 20, at 34. Organizations such as the American Association of University Professors (1915), the American Federation of Teachers (1916), and the American Civil Liberties Union (1920), brought widespread recognition of the need for academic freedom. *Id.*

<sup>22</sup> See *Scopes v. State*, 289 S.W. 363, 365-66 (Tenn. 1927) (upheld law forbidding teaching of evolution theory in public schools); see also BUSH, *supra* note 20, at 33. To test Tennessee's anti-evolution law, which made it unlawful for any teacher to instruct their students on the evolution theory, John Thomas Scopes, a local biology teacher, challenged the law as a "violation of constitutional prohibitions against the mixing of church and state." *Id.* Although Scopes was found guilty after a ten day trial, his appeal never reached the Supreme Court as planned because the conviction was reversed on a slight technicality by the State Appellate Court. *Id.* at 34.

## Resurgence of Censorship

commissions' power to screen school reading material.<sup>23</sup> These commissions were often pressured by business, political, religious, racial and other groups, to select conforming, noncontroversial textbooks.<sup>24</sup> In response, authors and publishers often made changes to reflect the textbook commissions' opinions.<sup>25</sup> After World War II, textbook commissions targeted material that they suspected of being favorable to Communism or atheism.<sup>26</sup> This censorship practice lingered into the late 1940s and 1950s as questions of academic freedom continued to plague the courts, and ambiguous governmental policies confused the nation.<sup>27</sup> Although by this time most Americans were aware of the First Amendment and what it stood for, censorship and government intrusion in the educational system seemed to infiltrate everyday life without much objection.<sup>28</sup>

### *D. Censorship Today*

Today, acquiescence to subtle government intrusion has opened

<sup>23</sup> See 5 ENCYCLOPAEDIA BRITANNICA 166 (1964). In some states "textbook commissions" or "committees of the local school board" were organized to select textbooks to be used in public schools. *Id.*

<sup>24</sup> See JACK NELSON & GENE ROBERTS, JR., THE CENSORS AND THE SCHOOLS 29 (1977) ("[T]extbook censors . . . were successful in getting authors and publishers to conform to their prejudices.").

<sup>25</sup> See, e.g., *id.* at 30. "To win sales in Texas and other anti-Darwinian hotbeds, some publishing houses struck references to evolution from their volumes." *Id.*

<sup>26</sup> See generally ELI M. OBOLER, DEFENDING INTELLECTUAL FREEDOM: THE LIBRARY AND THE CENSOR 29-30 (1980). In 1952, Senator McCarthy introduced a bill prohibiting the introduction of communist ideas in educational institutions. *Id.* McCarthy stated that "[i]f any Senator thinks that we must give Communists the right to go into our colleges, high schools and grade schools to twist, distort, and pervert the minds of our young people then that Senator . . . knows nothing about the Communist movement . . ." *Id.* at 30.

<sup>27</sup> See, e.g., *Burstyn v. Wilson*, 343 U.S. 495, 501-02 (1952) (motion pictures entitled to protection as free speech under First and Fourteenth Amendments); see also BUSH, *supra* note 20, at 42. Many teachers and students who received federal aid were required to take loyalty oaths pursuant to the National Defense Education Act of 1958, in an effort to prevent the spread of communist ideology in the schools. *Id.*

<sup>28</sup> See BUSH, *supra* note 20, at 43. "It became increasingly clear in the 1950s that anti-communist charges and investigations had endangered the basic rights of many persons, and freedom of expression was dealt a heavy blow by McCarthyism." *Id.* Fear of communism led to investigations by Congress into alleged communist activities involving labor unions, universities, and the motion picture industry. *Id.* at 42; see also HERBERT MITGANG, DANGEROUS DOSSIERS 43 (1988). Governmental intrusions also took the form of secret FBI investigations of many American Nobel laureates such as Pearl S. Buck, William Faulkner, Ernest Hemingway, Sinclair Lewis, Thomas Mann, and John Steinbeck. *Id.*



the door to a policy of academic censorship.<sup>29</sup> A clear example of this can be found in our nation's public schools where textbooks, films, and other publications have continued to be censored at epidemic rates.<sup>30</sup> It is submitted that many American schools embrace censorship and discourage diverse student speech, conduct, and expression in order to maintain "political correctness."<sup>31</sup> Through the distortion of truth and its impact upon individual thought, one cannot help but wonder if George Orwell's *1984* was a "prophetic clue to our present situation."<sup>32</sup>

## II. JUDICIAL LIMITATIONS ON THE POWER TO CENSOR

If the ability to censor corrupts, then unbridled and broad discretion to censor corrupts absolutely.<sup>33</sup> As a means of restricting this power, particularly in the educational setting, courts have construed the First Amendment to require varying levels of scru-

<sup>29</sup> See HAROLD J. SALEMSON, *THOUGHT CONTROL IN THE U.S.A.* 216 (1977). "Today our . . . textbooks are being purged . . . tomorrow may we expect to witness book-burning ceremonies . . . ?" *Id.* "Today our radio commentators are being silenced . . . tomorrow shall we wake up to find our airwaves given over . . . to the calculated lies of Fascist demagogues?" *Id.* This trend toward thought control has made a mockery of freedom of speech and communication in many fields of creativity and in education as well. *Id.* For instance, in most schools the idea of "student self-government is only a fable . . . [it] is a device to make the students believe that they are exercising rights of Democracy" when in reality decisions are made by the sponsor or administrator. *Id.* at 403.

<sup>30</sup> See, e.g., *Virgil v. School Bd. of Columbus County*, 862 F.2d 1517, 1518 (11th Cir. 1989) (allowing school district to remove textbook because of works therein which it deemed sexual and vulgar). *But see Pratt v. Independent Sch. Dist. No. 831*, 670 F.2d 771, 773 (8th Cir. 1982) (school's prohibition of showing film version of *The Lottery* by Shirley Jackson violated students' First Amendment rights); *Doe v. University of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989) (university regulation that prohibited "discriminatory" speech by students violated Due Process Clause).

<sup>31</sup> See SALEMSON, *supra* note 29, at 295. "[E]ducational history shows plainly that in times of social and political crisis, in times when the shifts in locus of power loom ahead, opposition to free thought in schools becomes open, rather than covert—intense, direct, and organized, rather than mildly disapproving." *Id.*

<sup>32</sup> Stephen Spender, *Thoughts on Censorship in the World of 1984*, in *CENSORSHIP*, *supra* note 1, at 116, 124; see Joan Hoff-Wilson, *The Pluralistic Society*, in *CENSORSHIP*, *supra* note 1, at 103, 113. "In 1983, the Reagan Administration proposed, in 'National Security Decision Directive 84,' lifelong review of books and speeches written by former government officials who had access to classified information." *Id.* Although this Directive was partially withdrawn, it was characterized as an "Orwellian-titled attempt at presidential censorship." *Id.*

<sup>33</sup> See generally NICCOLO MACHIAVELLI, *THE PRINCE* 22 (George Bull trans., 1981). Machiavelli set forth, in the form of political satire, generalizations about how a ruler should govern and behave politically. *Id.*

## Resurgence of Censorship

tiny to limit content and viewpoint-based exclusions.<sup>34</sup> In cases involving nonpublic fora, the Supreme Court requires a reasonable scrutiny test, in contrast to cases involving limited public fora and public fora, which trigger the application of strict scrutiny.<sup>35</sup> It is submitted that without reasonable standards or limitations on censorship, our nation's youth will suffer profoundly as a result of limited intellectual exposure.<sup>36</sup> It is further submitted that these tiers of scrutiny articulated by the courts are the keys to resolving this dilemma.<sup>37</sup> Freedom from unwarranted government censorship may only be realized when courts correctly analyze the facts

<sup>34</sup> See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (exclusion of speakers from public fora must be necessary to serve compelling state interests and be narrowly drawn to achieve such interests). *Cornelius* discussed the test applicable to public fora: "Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Id.*; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983). *Perry* involved a nonpublic forum. *Id.* In these cases, there is a right to exclude access on the basis of subject matter and speaker identification. *Id.* The exclusions must be reasonable in regard to the purpose served. *Id.*; *Carey v. Brown*, 447 U.S. 455, 461 (1980). In order for a state to enforce a content-based exclusion in a public forum, it must be shown that it is necessary to serve a compelling state interest and that the regulation is narrowly drawn to achieve that interest. *Id.*

<sup>35</sup> See *Perry*, 460 U.S. at 48 (describing test for nonpublic fora); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (in nonpublic fora cases officials may impose reasonable restrictions on speech); *Carey*, 447 U.S. at 461 (public forum requires strict scrutiny).

<sup>36</sup> See *Hazelwood*, 484 U.S. at 278 (Brennan, J., dissenting). "Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship." *Id.*; *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969) (courts must be vigilantly attentive in safeguarding constitutional rights afforded school children). See generally Alan Goldberg, Comment, *Textbook Removal Decisions and the First Amendment—A Better Balance*, 62 TEMP. L. REV. 1317, 1318 (1989) (nation's future depends on training of leaders through exposure of many ideas rather than by authoritative selection); Dinita L. James, Note, *The School as Publisher: Hazelwood School District v. Kuhlmeier*, 67 N.C. L. REV. 503, 517 (1989). "If controversy and criticism are eliminated from the school-sponsored modes of expression, then students will have lost their most effective means of sharing ideas and attitudes." *Id.*

<sup>37</sup> See *Planned Parenthood of S. Nev. v. Clark County Sch. Dist.*, 941 F.2d 817, 835 (9th Cir. 1991) (Norris, J., dissenting). "The reason is quite basic: the threat to First Amendment values is too great when no standards appear anywhere; no narrowly drawn limitations; no circumscribing of . . . [government's] absolute power . . ." (citing *Niemotko v. Maryland*, 340 U.S. 268, 277 (1951)). *Id.*; see also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). Procedural safeguards are "but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks." *Id.* See generally Note, *Administrative Regulation of High School Press*, 83 MICH. L. REV. 625, 629-630 (1984) (prior restraints on publications are least tolerable infringement on freedom of speech, and must overcome heavy presumption of invalidity).

of each case and properly apply the mandated safeguards.<sup>38</sup> Similarly, the varying and inconsistent analyses applied by the lower courts concerning censorship issues in the educational realm are a direct result of the Supreme Court's failure to enunciate clear and concise guidelines when defining the forum.<sup>39</sup>

Over twenty years ago, the Supreme Court reiterated its position of affording First Amendment protections to public school students in the landmark decision of *Tinker v. Des Moines Independent Community School District*.<sup>40</sup> Subsequently, the Supreme Court stated the proposition that this right is not absolute, since the rights of public school students "are not automatically coextensive with the rights of adults in other settings."<sup>41</sup> Hence, guidelines must be applied in light of the special characteristics of the school

<sup>38</sup> See *Planned Parenthood*, 941 F.2d at 831 (Norris, J., dissenting). The dissent argued that the majority "so grossly misreads and misapplies *Hazelwood* that it turns *Hazelwood* into a peculiar anomaly, isolated from, and in conflict with the rest of the Court's public forum cases." *Id.* Furthermore, it contends that the majority misunderstands the "public forum test" provided by *Hazelwood* and prior Supreme Court precedent. *Id.* See generally Lelia B. Helms & Larry D. Bartlett, *Recent Developments in Public Education*, 22 URB. LAW. 833, 833 (1990) (Ninth Circuit abandoned precedent in deciding *Planned Parenthood*).

<sup>39</sup> See Bryks, *supra* note 5, at 314. "Ironically, by evading *Tinker*, the Court created an even greater responsibility which they failed to meet, of articulating a set of legitimate guidelines, and balancing techniques rooted in first amendment analysis to help future courts resolve this complex issue." *Id.*; W. Wat Hopkins, *Hazelwood v. Kuhlmeier: Sound Constitutional Law, Unsound Pedagogy*, 16 N. KY. L. REV. 521, 521 (1989) (Supreme Court has laid down solid precedent; however, *Hazelwood* is philosophically flawed, legitimizing censorship as sound method of teaching); Pamela A. Schechter, Note, *Public Forum Analysis and State Owned Publications: Beyond Kuhlmeier v. Hazelwood School District*, 55 FORDHAM L. REV. 241, 248-49 (1986) (inconsistencies exist among lower courts because courts apply various public forum tests).

<sup>40</sup> 393 U.S. 503 (1969). The Court held that the Constitution protects students' right to wear black armbands in protest of Vietnam War. *Id.* at 514. The Court reaffirmed its holding of almost fifty years that neither "students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506 (citations omitted). See generally *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (constitutional freedoms must be protected in American schools).

<sup>41</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). The Court held that the school district acted within its authority in imposing sanctions on students who made lewd and indecent speech during student elections. *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985)); see *T.L.O.*, 469 U.S. at 340-43 (relaxed restrictions as to searches in school as compared to search by police of ordinary subject); *Ginsberg v. New York*, 390 U.S. 629, 638-39 (1968) (state can allow sale of obscene magazine to adults, but bar sale to minors without infringing upon minor's constitutional rights). See generally Robert J. Shoop, Ph.D., *States Talk Back To The Supreme Court: 'Students Should Be Heard As Well As Seen'*, 59 W. EDUC. L. REP. 579 (1990) (growing number of state legislatures believe *Hazelwood* guidelines have diluted students' First Amendment rights).

## Resurgence of Censorship

environment.<sup>42</sup> The Court limited the protection of students' First Amendment rights, reasoning that the task of teaching and educating the nation's youth lay primarily in the parents and school system, and not in the judicial system.<sup>43</sup> Consequently, the job of the Supreme Court was "not to decide whether the message, or the messenger, is a menace or the messiah," but rather to enforce constitutional safeguards upon those educational systems that have, for whatever reason, abridged these free speech rights.<sup>44</sup>

Different levels of scrutiny have been created by the Supreme Court to assess and govern the constitutionality of censorship.<sup>45</sup> In deciding which level of scrutiny should be applied, courts look to the type of forum in which the censorship occurs.<sup>46</sup> In determining whether a forum is public, limited public, or nonpublic, courts focus on the degree to which government, or an administrative body, in policy or practice, opened its facilities to the public.<sup>47</sup>

<sup>42</sup> See *Tinker*, 393 U.S. at 506 (guidelines must be adhered to by school authorities).

<sup>43</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (education of today's youth is responsibility of teachers, school officials and parents, not federal judges); see also *Planned Parenthood of S. Nev. v. Clark County Sch. Dist.*, 941 F.2d 817, 819-20 (9th Cir. 1991). The court concluded that "[w]e are not educators and curricular choices are not ours to make." *Id.* at 820. See generally Bruce C. Hafen, Note, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L. J. 685, 701 (whether "authoritarian approach" will best develop the minds and expressive powers of children is more a matter of educational philosophy and practice than of constitutional law).

<sup>44</sup> See *Planned Parenthood*, 941 F.2d at 820. "We are not members of the Board of Education and it is not open to us as judges to decide this case as we might vote were we politicians." *Id.* See generally Bryks, *supra* note 5, at 312-13 (officials may only abridge students' rights when necessary to maintain learning environment; otherwise courts intervene).

<sup>45</sup> See *supra* notes 34 & 35 (discussing courts' treatment of public and nonpublic fora).

<sup>46</sup> See *Hazelwood*, 484 U.S. at 267. "We deal first with the question whether [the] *Spectrum* may appropriately be characterized as a forum for public expression." *Id.* (emphasis added). Since schools are not traditional public fora like streets and parks, they are only public fora if they have been opened "for indiscriminate use for the general public by the policy or . . . practice" of school's authorities. *Id.* (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 47 (1983). The Supreme Court utilizes forum analysis when determining whether the government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other reasons. *Id.* But cf. *Schechter*, *supra* note 39, at 248-49 (some courts disregard public forum intent test and employ either "rational" or "reasonable" basis test).

<sup>47</sup> See, e.g., *Perry*, 460 U.S. at 47. In applying the public forum test to the internal mail system the court asked "if by policy or by practice the Perry School District [had] opened its mail system for indiscriminate use by the general public." *Id.*; see *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (university policy allowing student clubs to meet in school facilities created open forum, and university cannot bar groups based on content of speech);

Furthermore, when identifying the parameters of the forum, courts look at "the access sought by the speaker."<sup>48</sup> Public fora have traditionally been used for purposes of assembly, for the communication of ideas, and for the discussion of public questions; whereas limited public fora or nonpublic fora are used for specific intended purposes.<sup>49</sup> Once the forum is defined, the court then decides which level of scrutiny to apply, thereby enabling it to conclude whether or not the offensive exclusion is violative of the First Amendment.<sup>50</sup>

### III. THE NINTH CIRCUIT DECIDES *PLANNED PARENTHOOD*

#### A. *High School Publications*

The Ninth Circuit focused on forum analysis with its holding in *Planned Parenthood*.<sup>51</sup> This case discussed the extent to which school officials may exercise editorial control over high school publications, and specifically whether they can justifiably censor a particular advertisement from a school newspaper.<sup>52</sup> The school's

Madison Joint Sch. Dist. No. 8 v. Wisconsin Empl. Relations Comm'n, 429 U.S. 167, 175-76 (1976) (if state opens forum for citizen input, it cannot discriminate between speakers on basis of content of their speech). See generally *Cornelius*, 473 U.S. at 802 (government creates public forum by intentionally opening nontraditional forum for public debate (citing *Perry*, 460 U.S. at 46)).

<sup>48</sup> *Cornelius*, 473 U.S. at 801. "When speakers seek general access to public property, the forum encompasses that property." *Id.* But see *Doe v. Small*, 934 F.2d 743, 772 (7th Cir. 1991) ("mere existence of a 'public forum' does not confer on private speakers an automatic right to free expression"); *Smith v. County of Albemarle, Va.*, 895 F.2d 953, 959 (4th Cir.) (private religious speech in public forum may be restricted if there is violation of establishment clause), *cert. denied*, 111 S. Ct. 74 (1990).

<sup>49</sup> See *Hazelwood*, 484 U.S. at 267 (explaining difference between public and nonpublic fora).

<sup>50</sup> See, e.g., *Cornelius*, 473 U.S. at 806. "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are all reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* (citation omitted); *Widmar*, 454 U.S. at 267-70 (university policy of accommodating meetings of student groups created public forum, and to justify exclusion based on religious content of speech, compelling interest narrowly drawn to achieve that end must be shown); *Planned Parenthood of S. Nev. v. Clark County Sch. Dist.*, 941 F.2d 817, 829-30 (9th Cir. 1991) (concluding advertising pages in school-sponsored publication are nonpublic fora, court applies reasonable standards and finds First Amendment is not violated).

<sup>51</sup> 941 F.2d at 819-23.

<sup>52</sup> *Id.* at 819. The court asserted that the concern raised was the same as the one in *Hazelwood*. *Id.* See generally *Helms & Bartlett*, *supra* note 38, at 833 (discussing *Planned Parenthood*'s holding that school can exercise great control over student publication because it did not create limited open forum).

## Resurgence of Censorship

policy gave broad latitude to its high school students to publish newspapers, yearbooks and athletic programs.<sup>53</sup> The various school principals were empowered to accept advertisements to defray publication costs.<sup>54</sup> However, the principals were required to comply with the advertising standards articulated in a school memorandum which stated that, "the school reserves the right to deny advertising space to any entity that does not serve the best interests of the school, the school district, and the community."<sup>55</sup>

Planned Parenthood submitted an advertisement that offered a variety of gynecological services and counseling.<sup>56</sup> The principals rejected it based on their belief that the advertisement was "controversial, offensive to some groups of people, [and would cause] tension and anxiety between teachers and parents, and between competing groups such as [Planned Parenthood] and pro-life forces."<sup>57</sup> Ironically, the school accepted a broad range of advertising that included, among others, casinos, bars, medical clinics, political candidates, and churches.<sup>58</sup> Essentially, space was given to all advertisers except Planned Parenthood.<sup>59</sup> In response, Planned

<sup>53</sup> *Planned Parenthood*, 941 F.2d at 820. Newspapers were published as part of two courses, Journalism I and II. *Id.* Yearbooks were published by students in Publications I and II. *Id.* Athletic programs were not part of the school curriculum, but were handed out to spectators at school-sponsored events. *Id.*

<sup>54</sup> *Id.* at 824.

<sup>55</sup> *Id.* at 821. The district memorandum, known as the "Hussey memorandum," stated in part:

A school has an important interest in avoiding the impression that it has endorsed a viewpoint at variance with its educational program . . . . If a school publication does accept advertising, some categories of advertising may be excluded [drug paraphernalia or alcoholic beverage advertisements may be excluded]. If advertising is allowed which promotes one side of a controversial issue, advertisements promoting the opposing side of a controversy should be similarly accepted.

*Id.* at 820 n.1. At the time of the suit, there were fifteen schools within the district. *Id.* at 821. Five had written regulations, eight wrote them after the litigation had begun, and two schools had no written guidelines. *Id.*

<sup>56</sup> *Id.* at 821 n.2. The advertisement submitted by Planned Parenthood to Clark County School District had the name and address and listed as its services, "Routine Gynecological Exams[,] Birth Control Methods[,] Pregnancy Testing & Verification[,] Pregnancy Counseling & Referral." *Id.*

<sup>57</sup> *Id.* at 829. The majority concluded that the school district's refusal to publish the advertisement was reasonable and that the schools could remain neutral on the controversial topic by not publishing the advertisement. *Id.*

<sup>58</sup> *Planned Parenthood*, 941 F.2d at 835 (Norris, J., dissenting). "The spectrum of advertisements ranged from the social to the spiritual, the psychological to the political." *Id.* (Norris, J., dissenting).

<sup>59</sup> *Id.* (Norris, J., dissenting).

Parenthood sued the school district under Section 1983,<sup>60</sup> alleging violations of their First Amendment rights because their advertisement was refused publication in the student newspaper.<sup>61</sup>

The district court, relying on *San Diego Commission Against Registration & the Draft (CARD) v. Governing Board of Grossmont Union High School District*,<sup>62</sup> held that the Planned Parenthood advertisement could not lawfully be excluded because the school district failed to show a compelling governmental interest in its denial of the advertising space.<sup>63</sup> This opinion was premised on the fact that the publications were considered limited public forums, and therefore, strict scrutiny was applied.<sup>64</sup> However, this order was later withdrawn and reversed after the Supreme Court decided *Hazelwood School District v. Kuhlmeier*,<sup>65</sup> which held that a school paper did not qualify as a public forum, and thus school officials could impose reasonable restrictions on student speech.<sup>66</sup> After an affirmance by the panel, the Ninth Circuit in *Planned Parenthood* took up the matter, en banc, and affirmed.<sup>67</sup>

### B. Public Forum Analysis

Since the parties stipulated that the advertisement was protected under the First Amendment, the primary issue in need of resolution was whether the forum was public, limited public, or

<sup>60</sup> The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982).

<sup>61</sup> *Planned Parenthood*, 941 F.2d at 820. Planned Parenthood claimed that their First and Fourteenth Amendment rights were violated. *Id.*

<sup>62</sup> 790 F.2d 1471 (9th Cir. 1986). CARD was a nonprofit organization which counseled young men on the alternative to military service. *Id.* at 1472. The organization sought to advertise in school newspapers. *Id.* The court held that the schools could not exclude the advertisement merely because it presented an opposing viewpoint to the position taken in previous advertisements in the newspaper. *Id.* The court further held that "[n]ewspapers, including the Board's, are devoted entirely to expressive activity," and therefore, were limited public fora. *Id.* at 1476.

<sup>63</sup> *Planned Parenthood*, 941 F.2d at 821.

<sup>64</sup> *Id.*

<sup>65</sup> 484 U.S. 260 (1988). Student staff members brought suit claiming their First Amendment rights were violated when two pages of articles were excluded from the school publication. *Id.* at 262. The Supreme Court held that the principal did not improperly censor the articles. *Id.* at 276. Furthermore, they held that the newspaper, produced by journalism students, was not a "public forum," and therefore, the officials retained the power to impose "reasonable" restrictions on the school publication. *Id.* at 270.

<sup>66</sup> *Id.* at 270.

<sup>67</sup> *Planned Parenthood*, 941 F.2d at 821.

## Resurgence of Censorship

nonpublic.<sup>68</sup> Only after this issue was determined could the court decide whether school officials were justified in their actions.<sup>69</sup>

The public forum test, as articulated in *Perry Education Association v. Perry Local Educators' Association*,<sup>70</sup> stated that school facilities would be deemed public fora if school officials have, by policy or by practice, opened these facilities "for indiscriminate use by the general public."<sup>71</sup> However, if these facilities have been constrained for specific intended purposes, then the forum is nonpublic, and the school authorities may impose reasonable restrictions on offensive publications by students.<sup>72</sup>

In *Planned Parenthood*, the majority analyzed the school's intention in maintaining a school newspaper.<sup>73</sup> The court found that the school's "intent [was] most clearly evidenced by written policies that explicitly reserve[d] the right to control content."<sup>74</sup> In

<sup>68</sup> *Id.* See generally *United States v. Eichman*, 496 U.S. 310, 318-19 (1990) (finding prohibition of flag burning inconsistent with First Amendment). The Court stated that "if there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). But cf. *Nitzberg v. Parks*, 525 F.2d 378, 381 (4th Cir. 1975) (First Amendment does not protect libel, obscenity, or speech that causes substantial disruption); Note, *supra* note 37, at 630 (unprotected speech includes obscene speech and speech endangering national security).

<sup>69</sup> *Planned Parenthood*, 941 F.2d at 821; see *Hazelwood*, 484 U.S. at 267 (dealing with question of whether the *Spectrum* could be characterized as forum for public expression); *Gambino v. Fairfax County Sch. Bd.*, 429 F. Supp. 731, 734-35 (E.D. Va.) (case turns on issue of whether "farm news" is public forum entitled to protection), *aff'd*, 564 F.2d 157 (4th Cir. 1977).

<sup>70</sup> 460 U.S. 37 (1983). The Supreme Court held that the internal mail facilities were not a limited public forum. *Id.* at 46. Therefore, as long as a regulation was reasonable and not an effort to suppress an opposing viewpoint, it did not violate First Amendment principles. *Id.* at 46-47.

<sup>71</sup> *Id.* at 47.

<sup>72</sup> *Id.* at 48. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Id.*; see *Greer v. Spock*, 424 U.S. 828, 838 n.10 (1976) (though entertainers had sometimes been invited to Fort Dix, military base was not public forum); *Lehman v. Shaker Heights*, 418 U.S. 298, 301-02 (1974) (although city transit system rented advertising space in trains, it was not required to accept political advertisements).

<sup>73</sup> *Planned Parenthood*, 941 F.2d at 836-37. Analyzing the test set out in *Hazelwood*, the court determined that the school's intent was the critical factor in the forum test. *Id.* See generally *James*, *supra* note 36, at 510 (*Hazelwood* provides school officials with three part test: second part is whether officials have intentionally opened up forum).

<sup>74</sup> *Planned Parenthood*, 941 F.2d at 823-24. The majority claimed it was relying on the factors found significant in *Hazelwood*. *Id.* The court looked to the "Hussey memorandum" which set out the district policy on what power the officials had with respect to the advertising section of the school publications. *Id.* This memo stated, in part, that "if a school publication does accept advertising, some categories of advertising may be excluded." *Id.*;



addition, the court stated that school officials did not deviate from this written policy in practice, for they maintained editorial control and responsibility over all publications and advertising space.<sup>76</sup> The court concluded that the intent necessary to create a public forum had not been established,<sup>76</sup> and applied a reasonable relationship test to the school authorities' justifications for prohibiting the proposed advertisement.<sup>77</sup> The school claimed it wanted to maintain a neutral position on the issues of family planning and sex education.<sup>78</sup> Relying on *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*,<sup>79</sup> the court found the school's interest in avoiding controversy in this nonpublic forum to be reasonable.<sup>80</sup> Although conceding that this rationale is not appli-

*see Hazelwood*, 484 U.S. at 269. The Board Policy stated that "[s]chool sponsored student publications will not restrict free expression of diverse viewpoints within the rules of responsible journalism." *Id.* The statement of policy produced by the newspaper stated "a student-press publication accepts all rights implied by the First Amendment." *Id.* The *Hazelwood* Court understood this to mean that at best the officials would not violate the students' First Amendment rights in light of the newspaper's role in the school curriculum. *Id.* "It does not reflect an intent to expand those rights converting a curricular newspaper into a public forum." *Id.*

<sup>76</sup> *Planned Parenthood*, 941 F.2d at 824. *But cf.* *Widmar v. Vincent*, 454 U.S. 263, 270-71 (1981) (having created open forum for student meetings, practice of excluding religious group inconsistent with policy); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (auditorium's purpose was to provide for cultural advancement, practice by officials to exclude the play *Hair* was inconsistent with policy).

<sup>77</sup> *Planned Parenthood*, 941 F.2d at 825.

<sup>78</sup> *Id.* at 821. Nevada statutes regulate classroom education on sexual reproduction and responsibility. *Id.* Following this requirement the school "sought to avoid conflict with the state requirements regarding the manner sex education [was] presented to students." *Id.* at 829.

<sup>79</sup> *Id.* at 829; *see Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). The Court stated that when denying access to a particular speaker or group, the denial must be reasonable "in light of the purpose served by the forum and [be] viewpoint neutral." *Id.* Furthermore, the Court stated that nonpublic fora are not required to allow expressive activity. *Id.* at 819; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The state may place restrictions on its limited public forum "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

<sup>80</sup> 473 U.S. 788 (1985).

<sup>80</sup> *Planned Parenthood*, 941 F.2d at 824. Relying on *Cornelius*, the court claimed that a nonpublic forum is not dedicated to open debate or the free exchange of ideas. *Id.* The school district did not want to associate itself with any position other than neutrality on such issues as abortion and birth control. *Id.* The school also sought to avoid conflicts with the state guidelines regarding the teaching of sex education. *Id.*; *see Hazelwood*, 484 U.S. at 271-72 (educators determine what material is appropriate including considerations of level of maturity and lesson to be learned); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (school may disassociate itself from school newspaper or play); Ralph D. Mandsley & Steven Permuth, *Free Speech and Public Education: An Overview of Legal, Social, and Political Issues*,

## Resurgence of Censorship

cable in a public forum, the court held that "a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas."<sup>81</sup>

### C. *Misunderstanding and Misapplication*

It is suggested that the Ninth Circuit committed three fundamental errors stemming from a misunderstanding and misapplication of the "public forum test."<sup>82</sup> First, the majority assumed that a school-created policy was the sole determinant of intent to create a public forum.<sup>83</sup> Second, the majority misapplied the *Hazelwood* public forum test, rendering its conclusions inaccurate.<sup>84</sup> Third, the court failed to correctly identify the proper forum as the advertising space, and not the newspaper itself, thereby leading the court to consider irrelevant policies and practices.<sup>85</sup> Citing these errors, the dissent in *Planned Parenthood* contended that if the court had applied the appropriate guidelines and case law, this holding would have been in harmony with existing Supreme Court precedent, instead of turning "fundamental First Amendment principles on their head."<sup>86</sup>

#### 1. Error in Relying on School's Intent

In its determination of which level of scrutiny to apply, the

16 ST. MARY'S L.J. 873, 887-88 (1985) (factors such as need for harmony and maturity of audience may be adequate to support disciplinary action).

<sup>81</sup> *Cornelius*, 473 U.S. at 811.

<sup>82</sup> See *Planned Parenthood*, 941 F.2d at 838 (Norris, J., dissenting) (court misapplied Supreme Court forum test).

<sup>83</sup> See *id.* at 836 (Norris, J., dissenting) (majority focused on degree which government opened up facility by specifically focusing on government's declarations of intent).

<sup>84</sup> See *id.* at 836-37 (Norris, J., dissenting). "The incompatibility of the majority's test with the Supreme Court's approach in *Hazelwood* rests on the simple fact that, in determining whether the school newspaper was a limited public forum, the Court considered far more factors than the majority does, and engaged in a far more sophisticated analysis . . . ." *Id.*

<sup>85</sup> See *id.* at 840-41 (Norris, J., dissenting). The forum in question is defined as the advertising space; therefore, only relevant policies and practices can be addressed. *Id.*

<sup>86</sup> *Id.* at 831 (Norris, J., dissenting). The dissent adamantly rejected the majority's contention that its public forum test emanated from *Hazelwood*. *Id.* The dissent further contended that the majority abandoned Supreme Court precedent in holding that school-sponsored publications were nonpublic fora. *Id.* See generally Helms & Bartlett, *supra* note 38, at 833 (*Planned Parenthood* abandoned precedent when deciding student newspaper was not limited open forum).

Ninth Circuit focused on whether the school created a public, limited public, or nonpublic forum.<sup>87</sup> The majority improperly limited their inquiry by relying heavily on the school's declaration of its intent to control content, and not carefully considering the procedures and actions of the school.<sup>88</sup> In other words, even if school officials limited the forum based on personal preferences, the majority would nevertheless contend that since the intent was deemed to have created a nonpublic forum, school officials could impose regulations as long as they were reasonable.<sup>89</sup> This reasoning is in conflict with Supreme Court precedent, which adamantly rejects this type of analysis.<sup>90</sup> For example, in *Southeastern Promotions, Ltd. v. Conrad*,<sup>91</sup> the mere intent to create a nonpublic forum was viewed as an invalid safeguard of censorship.<sup>92</sup> The

<sup>87</sup> See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). The *Perry* Court differentiated character of property into three categories. *Id.* The first type of forum is the traditional public forum which is devoted to assembly and debate. *Id.* The second type of forum consists of property which is created for a limited purpose. *Id.* The third type, the nonpublic forum, is not held open to the public at large. *Id.* This type may be limited on the basis of content and speaker identity. *Id.* See generally Bryks, *supra* note 5, at 305-06 (*Perry* decision sets out three types of fora to determine if censorship is outweighed by individual's interests); Mandsley & Permuth, *supra* note 80, at 883 (many courts consider type of forum when reviewing censorship in the educational setting). But cf. Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 (1984). Courts should focus more on the regulation and impingement on rights rather than limiting the inquiry to the type of forum. *Id.*

<sup>88</sup> *Planned Parenthood*, 941 F.2d at 836 (Norris, J., dissenting). Judge Norris felt that the "majority's test determines the nature of the forum solely on the basis of whether government declared its intent to control content." *Id.*

<sup>89</sup> *Id.* (Norris, J., dissenting). Judge Norris argued that the majority created its very own public forum test. *Id.* The dissent claimed that this test stood for the proposition that "so long as officials reserve for themselves broad discretion to control content, then they will be deemed to have 'intended' to create a nonpublic forum, and their content-based exclusions will escape strict scrutiny." *Id.* But cf. *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (since intent was to open forum to students, school cannot restrict particular religious group); *Madison Joint School Dist. v. Wisconsin Empl. Relations Comm.*, 429 U.S. 167, 176 (1976) (where school opened forum for direct citizen involvement, cannot prohibit teacher from speaking); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (purpose of movie theater was for expressive activity, rejection of play *Hair* improper).

<sup>90</sup> See *infra* note 92 and accompanying text (discussing holding in *Southeastern Promotions Ltd. v. Conrad*).

<sup>91</sup> 420 U.S. 546 (1975).

<sup>92</sup> *Id.* at 553. The rationale for the condemnation of unlimited discretion of censorship is "that the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Id.* "Our distaste for censorship . . . is deep-written in our law." *Id.*

## Resurgence of Censorship

Court felt that it was obligated to condemn administrations in which the exercise of such authority was not restricted by specific standards.<sup>93</sup> Similarly, in *Widmar v. Vincent*,<sup>94</sup> the Court looked beyond the explicit written policy of a university which declared that the intent of the university was to create a nonpublic forum.<sup>95</sup> The *Widmar* Court held that “through a policy of accommodating [student] meetings, the University ha[d] created a forum generally open for use by student groups.”<sup>96</sup> It is submitted that had the *Planned Parenthood* court looked beyond the school’s written policy, it would have found the intent to create a public or limited public forum, since the school accepted advertising from everyone but Planned Parenthood. It is further contended that the court would then have applied strict scrutiny and held in favor of Planned Parenthood.

### 2. Error in Misapplying *Hazelwood* and *Southeastern Promotions*

The second flaw in the court’s reasoning was the application of the Supreme Court’s holding in *Hazelwood*.<sup>97</sup> *Hazelwood* is easily distinguishable from *Planned Parenthood* in that the *Hazelwood* Court analyzed numerous factors in order to determine the intent of the school officials.<sup>98</sup> The *Planned Parenthood* majority, however, only considered the school’s written policies and went no

<sup>93</sup> *Id.*

<sup>94</sup> 454 U.S. 263 (1981).

<sup>95</sup> *Id.* at 265. The stated policy of the university was “to encourage the activities of student organizations.” *Id.* There were over 100 official student groups at the school. *Id.* These groups were allowed to conduct their meetings in the school’s facilities. *Id.*

<sup>96</sup> *Id.* at 267.

<sup>97</sup> *Planned Parenthood*, 941 F.2d at 837 (Norris, J., dissenting). The majority’s focus was not on the factors “that the Court found significant in *Hazelwood*.” *Id.* These factors included whether the publication was part of the high school curriculum, whether grades were given or credit received, what type of control the faculty member exercised and whether it needed approval by the principal or a faculty member in order for it to be published. *Id.* at 823.

<sup>98</sup> *Id.* at 823; see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 268 (1988). The *Hazelwood* Court analyzed the policies and practices surrounding the *Spectrum*, the school newspaper. *Id.* The written policy provided that the newspaper was developed within the school’s curriculum. *Id.* Furthermore, the students received grades and credit for their participation. *Id.* Additionally, they looked at the degree of control of the journalism teacher who “had the authority to exercise and in fact exercised a great deal of control over *Spectrum*.” *Id.* But cf. James, *supra* note 36, at 511 (under *Hazelwood* analysis if school sponsors activity conclusion is that forum is nonpublic).

further.<sup>99</sup> It is submitted that this is an incomplete application of the *Hazelwood* holding, because under the *Hazelwood* test, examination of a school's policies is only the first step of the analysis,<sup>100</sup> whereas *Planned Parenthood's* majority regarded the school's written policies as the first and only inquiry.<sup>101</sup>

In addition to an examination of policy, the Supreme Court has also mandated that official practices must be analyzed when construing an intent to create a nonpublic forum.<sup>102</sup> It is suggested that the majority further erred by minimizing the significance of this aspect of the test.<sup>103</sup> This error was noted by the dissent which declared that if "the school district adopted a policy that gave it broad discretion to control content,"<sup>104</sup> without actually limiting or confining the specific purpose in practice, "then the majority could not but conclude, as it did, that the district's 'practices were not inconsistent with the [district's] policies.'" <sup>105</sup> It is highly unlikely that the Supreme Court would condone a policy which would allow a school district to do whatever it pleases.<sup>106</sup> Such an approach directly contravened the Supreme Court's guideline reiterated in *Southeastern Promotions*,<sup>107</sup> that administrative policies are not the sole determinant of the character of a

<sup>99</sup> *Planned Parenthood*, 941 F.2d at 837-38 (Norris, J., dissenting).

<sup>100</sup> See *Hazelwood*, 484 U.S. at 267. The *Hazelwood* Court did not limit its inquiry to the school's policies but in addition considered that "school officials did not deviate in practice from their [written] policy." *Id.*

<sup>101</sup> *Planned Parenthood*, 941 F.2d at 837-38 (Norris, J., dissenting).

<sup>102</sup> See *Hazelwood*, 484 U.S. at 270. After reviewing the policy of the school, the Court next examined the school's practices. *Id.* The school officials were given great authority, which was exercised in light of the school's policies. *Id.* at 274; see also *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). When deciding what type of forum has been created, "the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Id.*; Bryks, *supra* note 5, at 308 ("policies and practices of the Hazelwood school district reveal that the school had intended *Spectrum* as a forum for student expression").

<sup>103</sup> See *Planned Parenthood*, 941 F.2d at 839 (Norris, J., dissenting). "[T]he majority's test explicitly deemphasizes the importance of government's practices." *Id.* The majority's holding made irrelevant the fact that the school solicited and accepted a variety of advertisements from numerous sources. *Id.*

<sup>104</sup> *Id.* (Norris, J., dissenting).

<sup>105</sup> *Id.* (Norris, J., dissenting).

<sup>106</sup> *Id.* at 836 (Norris, J., dissenting). This policy "established as the law of our circuit a standard that is heresy in First Amendment jurisprudence." *Id.*

<sup>107</sup> 420 U.S. 546, 552-54 (1975).

## Resurgence of Censorship

forum.<sup>108</sup> Specifically, that case indicated that when written or verbal policies conflict with practice, the courts will give at least equal weight to administrative officials' actions, as compared to articulated policy.<sup>109</sup> It is submitted that had the *Planned Parenthood* court accurately followed *Southeastern Promotions*, it would have properly concluded that the administration's practice of soliciting and selling advertisements to everyone but Planned Parenthood superseded any stated intent to restrict the forum.<sup>110</sup>

### 3. Error in Defining the Forum

In any forum analysis, a court cannot determine whether school officials opened a forum indiscriminately until they know the exact parameters of the forum in question.<sup>111</sup> Although this threshold question seems clear, it is at this precise point that the *Planned Parenthood* court diverged from precedent and committed its third error.<sup>112</sup> The *Cornelius* Court provided the underlying framework for defining a forum, by stating that we must focus on "the access sought by the speaker."<sup>113</sup> In order to claim First Amendment protection, initially the speaker must seek access to property in-

<sup>108</sup> See *id.* at 560 (system regulating use of public forum must have adequate procedural safeguards); *San Diego Comm. Against Registration & the Draft (CARD) v. Governing Bd. of Grossmont Union High Sch. Dist.*, 790 F.2d 1471, 1476 (9th Cir. 1986) (by giving equal weight to practices, court held forum was open to an array of advertisements).

<sup>109</sup> See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554-55 (1975) (theatre facilities held to be limited public forum based on municipal board's actions); see also *Planned Parenthood*, 941 F.2d at 839-40 (Norris, J., dissenting) (when there is conflict with school district policies, courts will characterize forum based on actual policies of government rather than stated policies).

<sup>110</sup> See *Planned Parenthood*, 941 F.2d at 839-40 (Norris, J., dissenting) (no intent manifested to keep forum nonpublic).

<sup>111</sup> See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985). "[I]n defining the forum we have focused on the access sought by the speaker." *Id.* Additionally, in cases seeking limited access to a forum, the courts "have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property." *Id.*; *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983) (internal mail system not deemed traditional public forum); cf. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (court treated advertising spaces on city buses as limited public forum); *Adderley v. Florida*, 385 U.S. 39, 48 (1966) (jailhouse grounds deemed nonpublic forum).

<sup>112</sup> See *Planned Parenthood*, 941 F.2d at 840-41 (Norris, J., dissenting). The access sought by Planned Parenthood was the advertising space in the newspaper. *Id.* "[T]his case does not involve a claimed right to editorial expression in a curricular newspaper." *Id.* However, the majority defined the relevant forum as the school newspaper. *Id.*

<sup>113</sup> *Cornelius*, 473 U.S. at 801.

tended for public use.<sup>114</sup> Thus, "[w]hen speakers seek general access to public property the forum encompasses that property."<sup>115</sup> Once the forum is identified, the court may only focus its attention on those practices and policies that relate to the specific forum.<sup>116</sup> Planned Parenthood sought access to the school publication only through its advertising space.<sup>117</sup> Since Planned Parenthood's sole intention was to advertise, this part of the publication was the only relevant medium available; the only lawful purpose of the advertising space was to raise revenue to defray publication costs.<sup>118</sup> The Planned Parenthood advertisement was not incompatible with this purpose since the sponsor was willing to pay for space in the advertising section of the school newspaper.<sup>119</sup> However, the *Planned Parenthood* majority attributed to Clark County School District "the same 'pedagogical concerns' referred to in *Hazelwood*."<sup>120</sup> Obviously, the court's erroneous char-

<sup>114</sup> See *id.* at 788, 801 (property defines relevant forum).

<sup>115</sup> *Id.* at 801.

<sup>116</sup> See *Planned Parenthood*, 941 F.2d at 840 (Norris, J., dissenting).

The forum's definition as the advertising space alone means that we may consider only those policies and practices that relate to the advertising space in determining whether school officials reserved the forum for a particular, lawful purpose that guided its content-based decisions and justified its exclusion of expressive activity incompatible with that purpose. All other policies and practices are simply irrelevant.

*Id.* (footnote omitted); see also *San Diego Comm. Against Registration & the Draft (CARD) v. Governing Bd. of Grossmont Union High Sch. Dist.*, 790 F.2d 1471, 1483 (9th Cir. 1986) (Wallace, J., dissenting) (distinguishing solicitation of public advertising from pedagogical goal of teaching journalistic management skills as not creating public forum).

<sup>117</sup> See *Planned Parenthood*, 941 F.2d at 840 (Norris, J., dissenting) (Planned Parenthood's purpose was only to advertise their services).

<sup>118</sup> See *id.* at 824. "There is no evidence that advertisements in newspapers or yearbooks were accepted for any purpose other than to enable the school to raise revenue to finance the publications, and at the same time impart journalistic management skills to students." *Id.* (footnote omitted). Furthermore, with regard to the athletic programs, the only purpose served was to "defray the costs of this service." *Id.*

<sup>119</sup> See *id.* at 836 (Norris, J., dissenting). If Planned Parenthood submitted an advertisement for publication in the school's newspaper, then it would have been absolutely willing to pay for the space. *Id.*

<sup>120</sup> *Id.* at 841 (Norris, J., dissenting). In *Hazelwood*, the school officials were acting as educators; however, in *Planned Parenthood*, they were acting as "business managers concerned with the district's financial affairs." *Id.*; see *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988). School officials are entitled to take into consideration such factors as the emotional maturity level of the intended audience and speech that is "inconsistent with 'the shared values of a civilized social order.'" *Id.* at 272 (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986)). In addition, the school may disassociate itself "not only from speech that would substantially interfere with [its] work . . . but also from speech that

## Resurgence of Censorship

acterization does not stand once the forum is properly identified, because these concerns do not relate to the proper forum in issue—the advertising space.<sup>121</sup> It is contended that by accurately defining the affected forum as a limited public one, the *Planned Parenthood* majority's analysis would have considered policies relevant to the advertising space, and properly applied strict scrutiny to such policies in accordance with existing Supreme Court precedent.

### IV. QUESTIONS LEFT UNANSWERED

Although the *Planned Parenthood* court did not specifically address the First Amendment rights of students, it implicitly affected their right to receive important information.<sup>122</sup> As sexual activity among secondary school students presents a major social problem in the United States, it is suggested that the court's holding may indirectly prevent awareness among these students.<sup>123</sup>

The Supreme Court's analyses addressing the validity of censorship by officials of school newspapers and other publications has

is . . . ungrammatical, poorly written, [or] inadequately researched . . . ." *Id.* at 271 (citing *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 509 (1969)). *But cf.* Bryks, *supra* note 5, at 313-14. *Tinker* stands for the proposition that student expression can be censored only when it is "necessary to protect the substantial governmental interest of maintaining an orderly learning environment." *Id.* at 313. However, because *Hazelwood* circumvented and rephrased the issue to be decided, *Hazelwood* school officials were allowed to quash student speech for other reasons. *Id.* at 314.

<sup>121</sup> See *Planned Parenthood*, 941 F.2d at 841 (Norris, J., dissenting).

Had the advertising space been part of a curricular program designed to teach students advertising and management skills, pedagogical concerns would have informed our understanding of whether school officials opened up the forum indiscriminately or reserved it for a particular purpose . . . . But the school district does not claim that it sold the advertising space for any instructional purpose.

*Id.*

<sup>122</sup> *Id.* at 843 (Norris, J., dissenting). "[T]eaching sex education in the schools is one thing; advertising the availability of Planned Parenthood's services is quite another." *Id.*

<sup>123</sup> See generally WILLIAM NOBLE, BOOKBANNING IN AMERICA: WHO BANS BOOKS?—AND WHY 292-93 (1990). "Censorship cannot eliminate evil . . . [it] can only kill freedom." *Id.* "We believe Americans have the right to buy, stores have the right to sell, authors have the right to write, and publishers have the right to publish constitutionally protected material." *Id.* (quoting letter signed by Ed Morrow, president of the American Booksellers Association; and Harry Hoffman, president of Walden Book Co.); GERALD S. SNYDER, THE RIGHT TO BE INFORMED: CENSORSHIP IN THE UNITED STATES 178-81 (1976) (sexual attitudes are heading towards less constriction and more humanism; however parents continually vote down innovative programs concerning sexual activity).



culminated in fact-specific holdings.<sup>124</sup> Precedent dictates that school officials have the power to censor student newspapers and other publications; however, censorship issues regarding extracurricular activities, underground newspapers, and speeches, remain unresolved.<sup>125</sup>

Highlighting this problem are the arbitrary decisions by school officials which regulate student speech, ban books, and even prohibit theatrical productions.<sup>126</sup> The First Amendment dictates that restrictions on speech must be "narrowly drawn" to escape being unconstitutionally vague or overbroad.<sup>127</sup> However, some educators in public schools appear to operate under the mistaken belief that school regulations are above these First Amendment mandates.<sup>128</sup>

<sup>124</sup> See generally Hopkins, *supra* note 39, at 537-39 (holding in *Hazelwood* based on specific pedagogical concerns); Schechter, *supra* note 39, at 248 (inconsistencies exist among lower courts resulting from differing analyses defining public fora).

<sup>125</sup> See, e.g., Hopkins, *supra* note 39, at 521 (questions regarding censorship of extracurricular student newspapers left unanswered); see Lee Pray, Note, *What are the Limits to a School Board's Authority to Remove Books from School Library Shelves?*, 1982 WISC. L. REV. 417, 434. The problem of censorship has been recognized in a variety of other settings, some of which are under the guise of the right to receive information. *Id.* Settings include libraries of schools and school radio broadcasts. *Id.*; see also Kleindienst v. Mandel, 408 U.S. 753, 753 (1972) (Belgian journalist precluded from participating in academic conference); Pratt v. Indep. Sch. Dist., 670 F.2d 771, 776-78 (8th Cir. 1982) (school board cannot remove films because its members object to film's religious and ideological content); Zykan v. Warsaw Community Sch. Corp., 631 F.2d 1300, 1302 (7th Cir. 1980) (secondary school board removal of books, courses from school curriculum, and failure to rehire English teacher failed to state cause of action where complaint lacked allegation of imposition of religious and scientific orthodoxy).

<sup>126</sup> See, e.g., Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 853 (1982) (school prohibited from removing books solely because it disliked ideas expressed therein); Searcey v. Harris, 888 F.2d 1314, 1322 (11th Cir. 1989) (school board's efforts to prohibit peace organization speech held unconstitutional). But see, e.g., Virgil v. School Bd., 862 F.2d 1517, 1518 (11th Cir. 1989) (school district justified in removing textbook containing vulgarity and sexual explicitness when "reasonably related to legitimate pedagogical concerns"); Seyfried v. Walton, 668 F.2d 214, 217 (3rd Cir. 1981) (school cancellation of theater production of *Pippin* because of sexual overtones did not violate students' First Amendment rights).

<sup>127</sup> See J. Marc Abrams & S. Marc Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of Hazelwood School District v. Kuhlmeier*, 1988 DUKE L. J. 706, 729. "[R]egulations must offer criteria and specific examples so that students will understand what expression is proscribed." *Id.* See generally Michele D. Levine, *Reshelving the First Amendment*: Board of Education, Island Trees Union Free School District No. 26 v. Pico, 17 Loy. L.A. L. REV. 1057, 1057-58 (1984) (removal of textbooks must meet First Amendment scrutiny).

<sup>128</sup> See Papish v. Univ. of Mo., 410 U.S. 667, 670 (1973) (university's expulsion of student for publishing political cartoon held unconstitutional); Baughman v. Freienmuth, 478

## Resurgence of Censorship

### V. PROPOSALS

It is submitted that school officials must create regulations with "sufficient definiteness" so they comport with the First Amendment, and thus, function as a limitation on officials' broad power to censor.<sup>129</sup> It is further submitted that "pedagogical concerns" be expressly articulated in school policies, thereby enabling school officials to consistently follow in practice their own regulations.<sup>130</sup> It is self-evident that students do not enjoy absolute First Amendment rights, and censorship in some instances is necessary given the varying ages and levels of maturity among secondary school students.<sup>131</sup> However, unbridled discretion defeats the purpose of public education, which has always been to enlighten children so that they are equipped to live and participate in a democratic society.<sup>132</sup> It is submitted that if a school board wishes to attain this goal, then perhaps teaching students to be open to new ideas and to address controversial subjects is a better method than censorship.

### CONCLUSION

The continual struggle between expression and authority is deeply rooted in the human instinct to suppress discomforting or provocative ideas. For this reason, censorship remains a lurking nemesis, even in the most democratic of societies. American educational institutions exemplify this problem when school officials, entrusted with the development of our nation's children, restrict the free flow of information. The school district in *Planned*

F.2d 1345, 1347 (4th Cir. 1973) ("unlawful prior restraint on the distribution of non-school sponsored literature"); *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 977 (5th Cir. 1972) (school prohibition of off-campus distribution of underground newspaper after hours unconstitutional).

<sup>129</sup> See generally *Abrams & Goodman*, *supra* note 128, at 737-39 (explaining need for specific guidelines to be set forth in school policy).

<sup>130</sup> See generally, Note, *supra* note 37, at 650-55 (to safeguard against censorship, school must articulate justifiable regulations).

<sup>131</sup> See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683-84 (1986) (sexually suggestive speech by student not appropriate in public high school when addressed to less mature audience including 14 year olds).

<sup>132</sup> *Id.* at 681. The objectives of the public school system are to "prepare pupils for citizenship in the Republic" and instill values "necessary to the maintenance of a democratic political system." *Id.*

*Parenthood* indiscriminately opened its doors to advertisers. However, the court failed to apply the strict standard of review necessary to protect First Amendment principles and has, in effect, condoned broad discretion to censor. If abused, this discretionary power could produce a generation lacking in self-expression and independent thought, resulting in an "'Orwellian guardianship of the public mind.'"<sup>133</sup>

*Lana E. Levine & Catherine A. Reardon*

<sup>133</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 286 (1988) (Brennan, J., dissenting) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson J., concurring)).